it appeared that an irrigation canal ran across the land by virtue of an easement. *Held*, that this does not amount to an incumbrance within the meaning of the covenant. *Schurger* v. *Moorman*, 117 Pac. 122 (Idaho).

For a discussion of the principles involved, see 24 HARV. L. REV. 237.

DAMAGES — MEASURE OF DAMAGES — EFFECT OF RESALE IN CASES OF DELAYED DELIVERY. — The defendant contracted to deliver wood pulp to the plaintiff by the last of November, 1900, at 25*s.* per ton. Delivery was not made until July 1, 1901. Pulp was then worth 42*s.* 6*d.* per ton. In November, 1900, it was worth 70*s.* per ton. The plaintiff resold the pulp under contracts, some anterior to the contract with the defendant, and some anterior to the date of actual delivery, at 65*s.* per ton. He then sued for damages caused by the delay. There was no question of consequential damages. *Held*, that he may recover only 5*s.* per ton. *Wertheim* v. *Chicoutimi Pulp Co.*, [1911] A. C. 301 (Privy Council).

The general intention of the law of damages is to place the plaintiff in as good a position as he would have been in if the contract had been performed, *i. e.* to compensate only. *Hamilton* v. *Magill*, 12 L. R. Ir. 187, 202. With this in view, a formula for compensating for late delivery in sales of personalty has been often adopted, namely, "the difference between the value of the goods at the date fixed for delivery, and their value when delivered." This rule is, speaking generally, correct. *Clement & Hawkes Mfg. Co.* v. *Meserole*, 107 Mass. 362, 364. See BENJAMIN, SALES, 5 ed., 987. The principal case, however, gives as the proper measure of damages the difference between the value when the goods should have been delivered and the value represented by the price for which they were resold. If the contracts of resale could be satisfied by delivering this specific pulp only, then the rule of the principal case is probably correct. But, if any pulp of that certain grade would have answered the purposes of the sub-sale, it seems that the defendant should not take advantage of the plaintiff's good bargain in reselling. *Cf. Floyd* v. *Mann*, 146 Mich. 356, 369; *Rodocanachi, Sons & Co.* v. *Milburn Bros.*, 18 Q. B. D. 67, 77. But *cf. Foss* v. *Heineman*, 128 N. W. 881 (Wis.). The facts are not clear as to this. The case, however, is novel and there is a dearth of authority directly on the point decided.

DEATH BY WRONGFUL ACT — STATUTORY LIABILITY — PENAL STATUTES. — The sole beneficiary under the death statute released all claim of damages for the death. The administrator of the deceased now sues under the statute. *Held*, that the release operates as a bar. *Kennedy* v. *Davis*, 55 So. 104 (Ala.).

In an action for death by wrongful act, under the Missouri death statute, the plaintiff, the widow of the deceased, offered evidence of the number and ages of her minor children as evidence of loss of support. *Held*, that the evidence is admissible, as the statute is "remedio-penal." *Boyd* v. *Missouri Pacific Ry. Co.*, 139 S. W. 561 (Mo., Supr. Ct.).

The death statutes of most of the states are copied from Lord Campbell's Act, 9 & 10 VICT. c. 93, §§ 1, 2. Three states, however, have death statutes which do not, like that act, provide for damages based on the injury caused by the homicide. The Massachusetts statute provides for damages proportioned to the degree of culpability. MASS. R. L., c. 171, § 2. The Massachusetts decisions hold this statute penal. *Hudson* v. *Lynn & Boston R. Co.*, 185 Mass. 510. Yet a recent Massachusetts case intimates that there can be but one recovery against joint offenders. See *D'Almeida* v. *Boston & Maine R. Co.*, 95 N. E. 398, 399 (Mass.). The Alabama statute provides for damages "such as the jury may assess." ALA. CODE, § 2486. The Alabama court has many times held this statute penal, and excluded evidence of pecuniary loss. *Louisville & Nashville R. Co.* v. *Tegner*, 125 Ala. 593. Yet the same court has held that the defendant may be forced to give evidence against himself, as the

statute is not really penal. *Southern Ry. Co.* v. *Bush*, 122 Ala. 470. The principal Alabama case also treats the statute as remedial. Missouri has an expressly penal statute as to killing by a railroad. MO. REV. STAT., § 5425. The Supreme Court has treated this statute as penal, in considering its constitutionality. *Young* v. *St. Louis, Iron Mountain, & Southern R. Co.*, 227 Mo. 307. This court, wishing, in the principal case, to hold the statute remedial, has at last frankly fixed the true status of such a statute as "remedio-penal."

DECEIT — GENERAL REQUISITES AND DEFENSES — WHETHER ONE REPRESENTS THAT HIS ACTS ARE LEGAL. — A complaint for deceit against a director of a corporation set forth no other misrepresentation than that the directors declared a dividend, intending that the public should regard the declaration as a representation that the dividend had been earned, whereas it was in fact paid out of capital, contrary to a statute. *Held*, that the complaint sets forth no cause of action. *Ottinger* v. *Bennett*, 129 N. Y. Supp. 819 (App. Div.).

A representation may be effected by conduct as well as by words, provided that it may be reasonably implied from the conduct. *Collen* v. *Wright*, 8 E. & B. 647. Thus, an order for goods implies, by common understanding, an intention to pay for them. *Swift* v. *Rounds*, 19 R. I. 527. It by no means follows that the doing of an act is an implied representation of its legality. See *Ward* v. *Hobbs*, 4 A. C. 13, 29; 3 Q. B. D. 150, 163, 165. Whether it is so or not would seem to depend upon whether, on the particular facts of the case, it would be so understood by a reasonable person. It is true that the defendant's intent to mislead has sometimes been treated as the determining factor. *March* v. *First Nat. Bank*, 4 Hun (N. Y.) 466. It is submitted, however, that his secret intent cannot affect the question whether or not his conduct amounts to a statement of fact. If his act was ambiguous, it is not less so because he desired that a certain construction be put upon it. The question in the principal case would thus be whether, on its facts, a reasonable man would take the declaration of a dividend as a representation that it was to be paid only out of profits.

EMINENT DOMAIN — COMPENSATION — DATE AS OF WHICH DAMAGES ARE ASSESSED. — A railway company entered land without consent of the owner, or prior payment of compensation, and occupied it as a right of way for sixteen years, when the owner first brought suit for damages. The state constitution provided that "private property shall not be taken for public use, or damaged, without just compensation . . ., which shall be paid . . . before possession is taken." *Held*, that the damages are to be estimated as of the date of commencement of the action or the date of the trial. *Faulk* v. *Missouri River & N. W. Ry. Co.*, 132 N. W. 233 (S. D.).

Where such a constitutional provision exists, there is a conflict in the authorities as to the time as of which damages should be estimated. Some courts hold that the time of entry is decisive. *Wier* v. *St. Louis, etc. R. Co.*, 40 Kan. 130; *Stauffer* v. *East Stroudsburg Borough*, 215 Pa. St. 143. Their theory is analogous to the doctrine in the case of conversion of personal property. By bringing suit for damages, the landowner treats the wrongful entry as an appropriation, and hence the damages should be assessed as of that time. Moreover the objectionable speculative element involved in estimating the compensation according to the increased or decreased value of the land at the time of trial is avoided. Other courts, however, hold that the damages are to be determined by the time of trial, since, though the railroad can lawfully appropriate the land at any time, until it does so the title is in the owner, and hence damages should be estimated as of the time of lawful appropriation. *Railroad Co.* v. *Perkins*, 49 Oh. St. 326; *San Antonio, etc. Ry. Co.* v. *Ruby*, 80 Tex. 172.